THE FUTURE OF INTERNATIONAL LAW

BY E. S. ROSCOE

NOT a few lawyers and laymen have always been sceptical of the value of international law, because it has, unlike municipal law, not been enforceable by any form of legal sanction. They have, logically enough, denied that it was strictly law at all, and asserted that the word law, as applied to it, was misleading. But for what it is worth, the word is not likely to be altered, and the term " international law " is now too fixed in the general understanding as comprehending a body of customs and rules regulating the rights and duties of nations and peoples *inter se,* to be liable to change.

It is now, however, after the experience of the present war, beyond doubt that the absence of any kind of sanction is fatal in a large measure to the value of international law. Publicists and politicians have been in some degree to blame for this inflated value. For, if one thing more than another is obvious, as we look back over the last half century, it is that jurists have laid down rules and delegates have signed conventions with the utmost satisfaction to themselves without attempting even to consider how their rules and their conventions were to be enforced, and without any expression of doubt that they would be binding. The optimistic amiability which has actuated them is pitiable to regard. The strong attacks in Great Britain on the Declaration of London show that it was supposed, even by its opponents, that if it were ratified it would be irretrievably binding. Men generally were then in a state of false security, believing that at any rate international agreements would not be broken. It was in fact assumed that a reign of international law at length existed as part of an advanced civilization. But the true result of the several agreements from the Declaration of Paris in 1856 has been the formulation of an agreed statement of cer-

tain hitherto doubtful propositions. "Maritime Law," says the preamble to the Declaration of Paris, "in time of war has been for a long time the subject of regrettable disputes;" it then asserts the desirability of establishing some uniform doctrine. But the result is, in actual fact and under present circumstances, no more than a partial codification of certain voluntary but hitherto disputed principles. On the other hand, the tendency at the present moment is to take too pessimistic a view of the subject and amidst many direct violations of international rules to overlook the abounding continuance of a large body of international law as an effective though not compulsory guide to international conduct. In spite of this, however, we must now realize that it may be useless for jurists to lay down maxims on the written page or for delegates to append their signatures to international pacts unless they can be made binding. The practice in the past has tended to lull the world into a false security, for we now very clearly see that however obviously right from the point of view of international morality a custom or a rule may be, it is liable to be infringed by a nation which does not find it convenient to be bound by it.

One may take for example the use of asphyxiating gases. By the Declaration on this subject signed at The Hague on July the 29th, 1899,—of which Germany was then a signatory and Great Britain, at a later date—the contracting Powers forbid the employment of projectiles having for their only object the diffusion of asphyxiating or noxious gases. The Declaration contains a clause that it ceases to be binding if a non-signatory Power becomes an ally of a signatory Power, though why this fact should have this effect, unless the non-signatory Power does not abide by the rule, it is difficult to understand. But be that as it may, and without reference to the merits of the Declaration, here is an international compact which Germany infringed without notice and without hesitation. This particular declaration was admitted by and virtually the result of the Declaration signed at St. Petersburg in 1868, the preamble of which noted that "the progress of civilization should result as far as possible in diminishing the calamities of war." But from the very beginning of the present war the object of the Germans has been not to lessen, but to increase, its horrors, and thus to act in direct violation of an admitted international principle.

One cannot, under these circumstances, but ask the ques-

tion, what is to be the position of international law after the war? Is it to be in a more real sense law, or is it to remain as now, a mere statement of ethical international conduct? It is not of much use for conventions to be signed at The Hague or any other place, if, when the time comes for them to have effect, they are to be treated as waste paper at the will and pleasure of any great Power who chooses not to be bound by them.

It is clear, therefore, that some form of international sanction should be created by which some rules, at any rate, of international law can be enforced. When we reach this point it becomes obvious that the necessary sanction can be obtained only by means of an international agreement to enforce some definite rules. Consequently, the future efficacy of international law seems to depend, in a great measure, upon the formation of what in public discussion has been called a League of Nations. The war has shown that the mere common assent of several Powers to a particular instrument which embodies particular principles or rules of international conduct does not—standing alone—cause them to be adhered to. Consequently, it follows that in addition to a common agreement as to certain phases of international conduct, there should also be common determination that a Power refusing to abide by a contract shall be compelled to do so by the other signatories. From this, one result seems to flow: that only such rules as are based on universally accepted principles and are clearly stated and agreed to by signatory nations can be capable of a combined international enforcement. If this be so, then only a limited number of rules will have attached to them an actual international sanction.

It seems also to follow that until the full result of the present war is apparent, and until the so-called League of Nations is actually formed, it will avail little to trouble about the body and substance of international law. For, if rules are not to be made effective by international sanction they will remain only precepts of international morality, which, like precepts of personal morality, are followed by well disposed and contravened by evil disposed persons unless they happen to be embodied in municipal jurisprudence so as to be enforceable by the ordinary machinery of justice.

Assuming, however, that one result of the war is the formation of a body of nations prepared to enforce certain rules of international law, it is impossible not to perceive the

many difficulties which are still before us. For one thing, the vastness of changes in the world to-day may render an international agreement after the space of perhaps a quarter of a century plainly futile. This is especially a difficulty which faces any one who would desire a definite code regulating war on land and sea. In a recent number of this REVIEW I showed how the attempt to regulate the law as to contraband—a fairly simple subject—had broken down. This particular point was clearly stated by Admiral Mahan in the discussion which preceded the passing of the Declaration as to the use of asphyxiating gases. "A vote now taken," he said, "would be in ignorance of the facts. . . . As to whether injury in excess of that necessary to attain the ends of warfare, of immediately disabling the enemy, would be inflicted." While this argument referred only to the subject before the delegates, its basis has a wider application, for it is worse than useless to formulate rules the action of which at a given time cannot be foreseen. Again, the vastness of the disturbance caused by a modern war makes the issue so vital that the temptation to break an agreement, if by so doing success is brought nearer, is certainly stronger than it was in former times, and the difficulty of enforcement so much the greater. There is a legal maxim, *de minimis non curat lex*—the law is not concerned with trivial things, as it may be rendered. Does it not bring us up against essential and non-essential rules of international law? Are there not rules of international conduct which are scarcely of sufficient importance to demand large international action which yet have to be formulated? Another point may be put interrogatively: Is it possible to obtain unanimity in regard to rules when delegates have one eye on international morality and another on national interests, when a nation cannot foresee if in a war it may be neutral or belligerent? Should a small nation—it is unnecessary to give examples—by its non-signature prevent a rule from having full validity by international sanction? Allusion has just been made to the fact that a Power not a signatory to the Declaration as to asphyxiating gases—and the Declaration is used here only to illustrate general points—can by adhering to a signatory Power during a war cause the invalidity of the Declaration. Is such a state of things to continue in the future? One might reply that nations should agree on certain basic principles and leave the application of them to time and circumstance, and it may be

to a decision of a League of Nations. It is a basic rule that neutrals may supply belligerents with any kind of goods, and, consequently, as money is only one article of commerce, a belligerent may raise a loan in a neutral country. Upon this point international writers have differed, which shows, among other things, that a statement of a proposition of international law by a writer, however eminent, must not be regarded as more than the expression of a personal view. But difference or no difference, international custom applying a basic principle to a certain set of facts has regarded the raising of a loan in a neutral country as valid. Here is a distinct example of the growth of international law in connection with the development of modern commerce and financial intercourse and of a recognized consequential rule. Yet it is one which could quite conceivably be broken by a belligerent nation which was strong enough to prevent a neutral nation from lending money to another belligerent. It is also an example of a practice which has produced on this point international order and regularity, and which, as experience has shown, is agreed to by civilized nations. As an international custom it is not compulsorily binding. If embodied as an international rule would there be a sufficient international sanction to enforce it if infringed? Indeed, should it be left a custom, or, assuming the creation of a League of Nations, should it be formulated as an absolute international rule? The question is asked not because a special importance can be attached to this particular subject over others, but because it is only by endeavoring to apply theories to concrete cases that we can get among realities. The late Mr. Hall, with remarkable prevision, wrote in 1889 in the Introduction to the Third Edition of the *Treatise on International Law* that it would be idle

also to pretend that Europe is not now in great likelihood moving towards a time at which the strength of international law will be too hardly tried. Probably in the next great war the questions which have accumulated during the last half century and more will all be given their answers at once. Some hates, moreover, will crave for satisfaction; much envy and greed will be at work; but above all, and at the bottom of all, there will be the hard sense of necessity. Whole nations will be in the field; the commerce of the world may be on sea to win or lose; national existences will be at stake; men will be tempted to do anything which will shorten hostilities and tend to a decisive issue. Conduct in the next great war will certainly be hard; it is very doubtful if it will be scrupulous, whether on the part of belligerents or neutrals; and most likely the next war will be great.

The author's pessimistic presentiment has come true. Will the permanent result which he foresees of a temporary period only of anarchy be equally accurate? "There can be very little doubt that if the next war is unscrupulously waged, it also will be followed by a reaction toward increased stringency of law." This would seem to depend on one of two circumstances—on the creation of a collective international league unalterably determined to enforce international agreements, or on the practical strength of an outraged international morality without reference to any new and ideal formation of international forces.

Certainly, however, it is desirable that not only those who are professionally, whether academically or officially, interested in the law of nations, but the public generally, should seek to realize the probable position of the subject after the end of the war, and that it is a matter of vital importance to the peoples of the world. It may be urged that if a permanently peaceable international condition succeeds as a result of this unparalleled war, it is futile to consider principles and rules, many of which come into action only during a state of war. No doubt there is truth in this contention, but in the obscurity which at present envelops future international relations it is well to endeavor to formulate, however imperfectly, our ideas on the subject discussed in the preceding pages.

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